In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 232

HARRY B. NORDSTROM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner embezzled approximately $74,000 from his employer during the years 1958 through 1960, and an additional $10,000 on May 12, 1961. He did not report any of these amounts on his income tax returns. Petitioner was indicted on four counts of wilfully attempting to evade income tax, one count for each of the four years 1958 through 1961. The district court found petitioner not guilty on the counts for 1958, 1959 and 1960, on the ground that he had filed his returns for those years while *Commissioner* v. *Wilcox*, 327 U.S. 404, was still the law. The district court found petitioner guilty on the 1961 count, since the return for that year was filed after *James*

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v. *United States,* 366 U.S. 213, had overruled *Wilcox.* The court of appeals affirmed. (Pet. 13–18.) Only the correctness of the 1961 conviction is here in question.

In 1946 this Court in *Commissioner* v. *Wilcox, supra,* held that the proceeds of embezzlement were not taxable income. On May 15, 1961 (three days after petitioner embezzled the $10,000), in the case of *James* v. *United States, supra,* the Court overruled *Wilcox,* but held that since the taxpayer in that case "might have relied" on *Wilcox* (366 U.S. at 221), he could not have intentionally evaded his income tax on the embezzled money. Petitioner argues that he is protected by *Wilcox* because he embezzled the funds a few days before *James* was decided. This claim is plainly without merit. After the *James* decision it was clear that, in determining a person's civil tax liability, embezzled funds constituted taxable income regardless of when the embezzlement took place,[1] but

[1] All of the lower courts which have had occasion to consider the matter have uniformly so construed the *James* case. In addition to the decision below, see *Estate of Geiger* v. *Commissioner,* 352 F. 2d 221 (C.A. 8), certiorari denied, 382 U.S. 1012; *Adame's Estate* v. *Commissioner,* 320 F. 2d 811, 814 (C.A. 5) (as to the year 1953 which was not barred by the statute of limitations); *Stoller* v. *United States,* 320 F. 2d 340, 344 (Ct. Cl.); *Nerem* v. *Commissioner,* 41 T.C. 338, 344; *Muldrow* v. *Commissioner,* 38 T.C. 907, 912; *Hackney* v. *Commissioner,* decided May 12, 1965 (P–H Memo T.C., par 65,127); *Emerson* v. *Commissioner,* decided June 30, 1965 (P–H Memo T.C., par. 65,185); see also *Leaf* v. *Commissioner,* 295 F. 2d 503 (C.A. 6). Dicta to the same effect are present in *Sowell* v. *Commissioner,* 302 F. 2d 177, 181 (C.A. 5); *Donohue* v. *Commissioner,* 323 F. 2d 651, 652 (C.A. 7), certiorari denied, 376 U.S. 911; *United States* v.

that a taxpayer who filed his return before the date of the *James* decision, and who might thus have relied on the *Wilcox* opinion, could not be found to have wilfully evaded his civil income tax liability. Since taxpayer did not file his 1961 tax return until March, 1962, approximately 10 months after this Court decided *James,* he cannot claim that at the time of filing his 1961 return he was relying on *Wilcox.*

Petitioner quotes the following language from the Chief Justice's *James* opinion (366 U.S. at 221–222):

> We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed.

In context, it is clear that the phrase "at the time the alleged crime was committed" refers to the crime of wilfully evading federal income tax liability by filing a false return, and that the relevant time for determining whether "the element of willfulness" existed was when the taxpayer filed his return.[2]

Goldberg, 330 F. 2d 30, 39 (C.A. 3), certiorari denied, 377 U.S. 953. All of the above cases except *United States* v. *Goldberg* are civil tax cases.

[2] Nor is there any merit to petitioner's contention that the *James* decision left the law so uncertain that his conviction violated due process of law. After *James* it was clear that the proceeds of embezzlement constituted taxable income, that *Wilcox* had been expressly overruled, and that only those taxpayers who might have relied upon the *Wilcox* decision in failing to report the proceeds of embezzlement as taxable income were protected from criminal prosecution because of their lack of wilfulness.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

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